

Message Text

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P R 141716Z NOV 77
FM AMEMBASSY BONN
TO SECSTATE WASHDC PRIORITY 3114
INFO USMISSION USBERLIN PRIORITY
AMEMBASSY BERLIN
AMEMBASSY LONDON
AMEMBASSY MOSCOW
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USMISSION USNATO

C O N F I D E N T I A L SECTION 01 OF 04 BONN 18965

E.O. 11652: GDS
TAGS: PGOV BQG AKB
SUBJECT: REFERRAL OF CASE FROM BERLIN TO FRG
CONSTITUTIONAL COURT

REFS: (A) USBER 2736; (B) BONN 17394

BEGIN SUMMARY. ALLIED BONN GROUP REPS AND LEGAL ADVISERS HAVE MET JOINTLY WITH THE LEGAL ADVISERS FROM THE THREE BERLIN MISSIONS IN BONN IN ORDER TO RECONCILE THE DIVERGENT VIEWPOINTS EXPRESSED IN REFTELS. THERE WAS A CONSENSUS THAT IT MAY EVENTUALLY BECOME NECESSARY FOR THE ALLIED KOMMANDATURA TO ORDER THE BERLIN COURT TO WITHDRAW ITS REQUEST FOR THE FEDERAL CONSTITUTIONAL COURT TO RULE ON THE CONSTITUTIONALITY OF THE SOCIAL SECURITY LAWS WHICH ARE UNDER LITIGATION IN BERLIN. IT WAS ALSO AGREED, HOWEVER, THAT A CONFRONTATIONAL APPROACH SHOULD BE AVOIDED. TO THIS END, IT

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WOULD SEEM DESIRABLE FOR THE THREE MINISTERS IN BERLIN FIRST TO MEET WITH GOVERNING MAYOR STOBBE, TO DESCRIBE PRELIMINARY ALLIED CONCLUSIONS AND TO OFFER TO EXPLORE WITH THE SENAT WHETHER THERE ARE ANY ALTERNATIVES TO A DIRECT ALLIED ORDER TO THE COURT.

WHILE NOT SANGUINE THAT SUCH AN APPROACH WOULD

LEAD TO THE COURT'S VOLUNTARILY WITHDRAWING ITS SUBMISSION TO THE FEDERAL CONSTITUTIONAL COURT, WE BELIEVE THAT THIS PRELIMINARY STEP WOULD AT LEAST SERVE TO LESSEN THE POLITICAL IMPACT OF ALLIED INTERVENTION IN THE COURT PROCEEDINGS. ACTION REQUESTED: DEPARTMENT'S APPROVAL OF THE SUGGESTED APPROACH AND OF THE DRAFT TALKING POINTS, SET OUT BELOW, FOR USE BY THE MINISTERS WITH MAYOR STOBBE. END SUMMARY

1. IN TRIPARTITE DISCUSSIONS IN BONN SUBSEQUENT TO THOSE REPORTED IN REF (B), ALLIED REPS HAD SECOND THOUGHTS ON THE UTILITY OF INVITING THE FRG FOREIGN OFFICE TO PRESENT A BRIEF CONTAINING THE FRG VIEW OF HOW THE ACTION OF THE BERLIN COURT MIGHT BE ALLOWED TO STAND. AT THE SAME TIME, THERE WAS AGREEMENT ON THE NEED FOR MINIMIZING THE POLITICAL FALLOUT WHICH WAS ALMOST CERTAIN TO RESULT FROM ALLIED INTERVENTION IN THE CASE. FOR THAT REASON, NONE OF THE ALLIED REPS WAS WILLING TO SUPPORT A RECOMMENDATION THAT THE ALLIED KOMMANDATURA ISSUE AN ORDER TO THE COURT AS A NEXT STEP. THE SUBSEQUENT MEETING WITH THE LEGAL ADVISERS FROM BERLIN, AIMED AT FINDING A COMMON GROUND, WAS HELD IN BONN ON NOVEMBER 8.

2. BY WAY OF BACKGROUND, US EMBOFFS HAD IN THE MEANTIME HAD INFORMAL DISCUSSIONS WITH FRG OFFICIALS
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WHO WERE KNOWLEDGEABLE CONCERNING THE CASE AND WHO HAVE DISCUSSED SOME OF THE IMPLICATIONS WITH US WITHOUT THE AUTHORIZATION OF THEIR SUPERIORS. WE LEARNED FROM THESE DISCUSSIONS THAT THE FRG HAS IN FACT ALREADY PREPARED A POLICY PAPER ON THE CASE. THE PAPER, WHICH WE HAVE NOT SEEN BUT WHICH APPARENTLY REFLECTS THE VIEW THAT THE CASE SHOULD BE ALLOWED TO BE HEARD BY THE FCC, HAS REPORTEDLY RECEIVED THE BLESSING OF FOREIGN MINISTER GENSCHER. OUR SOURCES FRANKLY DOUBT, GIVEN WHAT HAS ALREADY BEEN APPROVED AT HIGH LEVELS, THAT THE FRG WOULD BE ABLE TO DRAFT A BRIEF WHICH WOULD BE CONSISTENT WITH ALLIED LAW.

3. SHOULD WE PURSUE THE IDEA OF INVITING THE FRG TO PREPARE A BRIEF, IT SEEMS LIKELY THAT ALL WE MIGHT EXPECT IN RESPONSE WOULD BE A STATEMENT OF FRG POLICY WHICH WOULD REFLECT ONLY FRG VIEWS ON ASPECTS INVOLVING ALLIED-FRG DISAGREEMENT AND WHICH WOULD NOT TAKE ALLIED CONCERNS ADEQUATELY INTO ACCOUNT. WE MIGHT THEREBY BE ENGAGED IN AN UNNECESSARY CONFRONTATION ON ALLIED-FRG DIFFERENCES IN BONN, RATHER THAN KEEPING THE LOCATION OF AT LEAST OUR INITIAL CONTACTS ON

THIS QUESTION IN BERLIN WHERE THE ALLIES ARE IN A MORE

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FM AMEMBASSY BONN
TO SECSTATE WASHDC PRIORITY 3115
INFO USMISSION USBERLIN PRIORITY
AMEMBASSY BERLIN
AMEMBASSY LONDON
AMEMBASSY MOSCOW
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C O N F I D E N T I A L SECTION 02 OF 04 BONN 18965

AUTHORITATIVE POSITION.

4. ONE POSSIBILITY SUGGESTED BY ONE OF OUR SOURCES --
WHO, AGAIN, WAS SPEAKING WITHOUT AUTHORIZATION -- WAS
THAT THE BERLIN COURT ITSELF MIGHT BE PERSUADED
VOLUNTARILY TO RESCIND ITS ACTION REFERRING THE
CONSTITUTIONAL QUESTION TO THE FEDERAL COURT IF IT WERE
MADE TO REALIZE THROUGH INFORMAL DISCUSSIONS THE
SERIOUSNESS OF THE STEP IT HAD TAKEN AS VIEWED BY
THE ALLIES. WHILE REALIZING THAT THE CHANCES FOR SUCH
ACTION WERE SLIM, THE ALLIED EMBASSIES WERE OF THE
OPINION THAT IT WOULD BE BETTER, AT LEAST OPTICALLY,
TO GIVE THE BERLIN COURT THE OPPORTUNITY TO RESCIND ITS
ACTION ON ITS OWN THAN TO ISSUE WITHOUT FOREWARNING AN
ORDER FOR IT TO DO SO.

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5. IN DISCUSSING AT THE NOVEMBER 8 MEETING THE FEASIBILITY OF BROACHING THIS IDEA TO THE COURT, EMBASSY REPS ACCEPTED THE VIEW OF THE BERLIN LEGAL ADVISERS THAT A DIRECT APPROACH TO THE COURT WOULD BE IMPROPER. THERE WAS AGREEMENT, HOWEVER, THAT THERE WOULD BE MERIT IN AN APPROACH AT THE POLITICAL LEVEL -- BY ALLIED MINISTERS (OR THE CHAIRMAN MINISTER) TO GOVERNING MAYOR STOBBE. SUCH AN APPROACH WOULD DEMONSTRATE THAT WE WERE CONSIDERING NOT ONLY THE LEGAL ASPECTS BUT ALSO THE SERIOUS POLITICAL IMPLICATIONS OF THE CASE. WHILE WE WOULD EXPRESS WILLINGNESS TO EXPLORE POSSIBILITIES FOR A SOLUTION SHORT OF AN ALLIED ORDER TO THE COURT IT WOULD BE UP TO THE BERLINERS TO SUGGEST ANY FURTHER DISCUSSIONS. IT WAS THUS AGREED TO RECOMMEND TO CAPITALS THAT SUCH AN APPROACH BE MADE TO THE GOVERNING MAYOR, AND AD REF AGREEMENT WAS REACHED ON A TALKING PAPER THAT COULD BE USED AT SUCH A MEETING.

6. THE BRITISH AND FRENCH BONN GROUP REPS HAVE STATED THEY DO NOT EXPECT THEIR CAPITALS TO BE PREPARED TO LET THE CASE BE DECIDED BY THE FEDERAL CONSTITUTIONAL COURT. AN ORDER TO THE BERLIN COURT TO WITHDRAW ITS SUBMISSION THUS SEEMS INEVITABLE, UNLESS SOME COMPROMISE CAN BE FOUND. AN APPROACH TO STOBBE ALONG THE LINES SUGGESTED IN THE AD REF TALKING PAPER SHOULD HELP TO MAKE MORE UNDERSTANDABLE THE PROBABLE ULTIMATE ISSUANCE OF AN AK ORDER AND HOPEFULLY WILL HELP TO DAMPEN THE POLITICAL REPERCUSSIONS. MORE-OVER, DISCUSSION OF THE ISSUE MAY SENSITIZE THE BERLIN COURTS FOR SOME TIME TO COME TO THIS KIND OF ISSUE AND ENHANCE THE CHANCES THAT ALLIED VIEWS WILL PROPERLY BE TAKEN INTO ACCOUNT BY BERLIN COURTS WHEN THEY APPROACH THE LIMITS OF THEIR COMPETENCE IN BERLIN SO FAR AS THE

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ALLIES ARE CONCERNED.

7. FOLLOWING IS THE TEXT OF THE AD REF TALKING PAPER:

BEGIN TEXT

1. ON 17 AUGUST 1976 THE LANDESSOZIALGERICHT BERLIN SUSPENDED A CASE PENDING BEFORE IT (FILE NO. L.12 AN 57/75) AND ASKED THE FEDERAL CONSTITUTIONAL COURT (FCC) TO REVIEW THE CONSTITUTIONALITY OF PARTS OF THE ANGESTELLTENVERSICHERUNGSGESETZ AND OF THE

RENTENREFORMGESETZ. THE REQUEST WAS REGISTERED WITH THE FCC ON 5 OCTOBER 1976 (FILE NO. 1 BVL 21/76).

2. THE TWO PLAINTIFFS IN THE CASE ARE NATIONALS OF THE US AND ARGENTINA RESPECTIVELY. THE DEFENDANT IS A FEDERAL AGENCY, THE BUNDESVERSICHERUNGSAINSTALT FUER ANGESTELLTE, WHICH HAS ITS HEADQUARTERS IN BERLIN. BECAUSE THE PLAINTIFFS ARE RESIDENT ABROAD, UNDER SECTION 57(3) OF THE SOZIALGERICHTSGESETZ THE BERLIN SOZIALGERICHT IS THE COMPETENT COURT OF FIRST INSTANCE. UNDER THE SAME LAW APPEALS LIE FROM THAT COURT TO THE BERLIN LANDESSOZIALGERICHT ("THE COURT"). ANY FURTHER APPEAL LIES TO THE BUNDESSOZIALGERICHT IN KASSEL. THE

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FM AMEMBASSY BONN

TO SECSTATE WASHDC PRIORITY 3116

INFO USMISSION USBERLIN PRIORITY

AMEMBASSY BERLIN

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BERLIN SOZIALGERICHT FOUND FOR THE PLAINTIFFS. ON APPEAL BY THE DEFENDANT, THE LANDESSOZIALGERICHT, RELYING ON ARTICLE 100 OF THE BASIC LAW, SUSPENDED JUDGMENT AND REFERRED THE CONSTITUTIONAL POINT DIRECTLY TO THE FCC.

3. THE COURT BASED ITS REFERENCE TO THE FCC AS
FOLLOWS:

"SUBMISSION TO THE FEDERAL CONSTITUTIONAL
COURT IS NOT PRECLUDED BY THE ALLIED PROTECTING
POWERS' RESERVED RIGHTS. THE FEDERAL CONSTITUTION-
AL COURT'S JUDGMENT WILL HAVE NO DIRECT OR INDIRECT
EFFECT ON THE BERLIN EXECUTIVE. THE PLAINTIFFS
ARE NATIONALS OF THE UNITED STATES AND ARGENTINA.
THEY ARE RESIDENT ABROAD. THE DEFENDANT IS A
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FEDERAL AGENCY, ADMITTEDLY LOCATED IN LAND BERLIN
SO THAT THE BERLIN SOZIALGERICHE ARE COMPETENT
LOCALLY UNDER SECTION 57, PARAGRAPH 3 OF THE
SOZIALGERICHTSGESETZ. VIS-A-VIS THE PLAINTIFFS
THE DEFENDANT RIGHTLY APPLIED FEDERAL LAW DIRECT

WITHOUT IT BEING IMPORTANT WHETHER THE LAW HAS
BEEN TAKEN OVER IN BERLIN.... THE COURTS, TOO,
IN CASES OF THIS KIND DO NOT EXAMINE BERLIN LAWS
PASSED BY THE BERLIN HOUSE OF REPRESENTATIVES BUT
RATHER LEGISLATION WHICH HAS COME ABOUT DIRECT IN
ACCORDANCE WITH THE PROCEDURE DESCRIBED IN
ARTICLE 76 FF OF THE BASIC LAW."

4. ALTHOUGH NO SPECIFIC ALLIED LEGISLATION WAS
MENTIONED BY THE COURT IN ITS DECISION, IT COULD ONLY
HAVE REACHED ITS CONCLUSION THAT THE SUBMISSION TO THE
FCC WAS NOT PRECLUDED BY ALLIED RESERVED RIGHTS EITHER
BY INTERPRETING THE RELEVANT ALLIED LEGISLATION, E.G.,
BK/O(50)75 AND BK/O(52)35, OR BY OMITTING TO TAKE SUCH
LEGISLATION INTO ACCOUNT. UNDER ARTICLE 3.2 OF AK LAW
NO. 7, IN CASES WHERE THE EXISTENCE, TERMS, VALIDITY OR
INTENT OF AN ALLIED ORDER IS AT ISSUE THE COURT IS
OBLIGED TO SUSPEND THE PROCEEDINGS AND REFER THE
MATTER TO THE APPROPRIATE SECTOR COMMANDANT, WHETHER OR
NOT THE SUBJECT MATTER OF THE PROCEEDINGS IS WITHIN THE
ALLIES' RESERVED FIELD. IT IS THE OPINION OF THE
ALLIED KOMMANDATURA THAT THE COURT SHOULD HAVE SOUGHT A
RULING FROM THE APPROPRIATE SECTOR COMMANDANT, PURSUANT
TO ARTICLE 3.2.

5. THE ALLIED KOMMANDATURA CONSIDERS THAT A BERLIN
COURT CAN ONLY REFER A CASE TO THE FCC IF THERE IS
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LEGAL BASIS FOR THIS UNDER THE LAW IN FORCE IN BERLIN.
IN THE FRG THE BASIS FOR SUCH REFERRAL IS ARTICLE 100
OF THE BASIC LAW AND THE LAW ON THE FCC OF 1951. THE
ALLIES HAVE NEVER ACCEPTED THAT ARTICLE 100 OF THE
BASIC LAW APPLIES IN BERLIN, AS TO DO SO WOULD BE
INCONSISTENT WITH THE PRINCIPLE THAT BERLIN IS NOT A
LAND OF THE FEDERAL REPUBLIC AND MAY NOT BE GOVERNED
BY THE FEDERATION. FOR THE SAME REASON, IN BK/O(52)35
THE ALLIED KOMMANDATURA REFUSED TO ALLOW THE TAKING
OVER IN BERLIN OF THE LAW ON THE FCC OF 1951 (WHICH
ESTABLISHED THE FCC AND LAID DOWN THE PROCEDURAL RULES
FOR REFERRING CASES TO IT). NOR IS THERE ANY PROCEDURE
BY WHICH A BERLIN COURT COULD VOLUNTARILY REFER A
QUESTION TO THE FCC. THUS, THERE APPEARS TO BE A
FUNDAMENTAL PROCEDURAL BARRIER TO ANY BERLIN COURT

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REFERRING A CASE TO THE FCC.

6. IN VIEW OF THE IMPORTANCE OF THE PROBLEM FOR

ALLIED AND GERMAN INTERESTS, THE ALLIED KOMMANDATURA
WOULD WELCOME THE OPPORTUNITY OF EXPLORING WITH THE
SENAT WHETHER ANY SOLUTION CAN BE FOUND WHICH WOULD
AVOID THE NECESSITY OF ORDERING THE COURT TO WITHDRAW
ITS SUBMISSION TO THE FCC.

END TEXT

8. ACTION REQUESTED: THAT THE DEPARTMENT AUTHORIZE
AN APPROACH IN BERLIN ON THE BASIS OF THE ABOVE TALKING
PAPER. (USBER HAS NOT SEEN THE FOREGOING REPORT BUT
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CONCURS IN THE RECOMMENDATION AND IN THE AD REF TEXT OF
THE TALKING PAPER.)
STOESSEL

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